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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	**SACV 10-841 AG (MLGx)**	Date	August 30, 2010
Title	BENJAMIN PAPARELLA v. JP MORGAN CHASE BANK, N.A.		

Present: The Honorable	ANDREW J. GUILFORD	
Lisa Bredahl	Not Present	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs: Attorneys Present for Defendants:

Proceedings: ORDER GRANTING PLAINTIFF'S MOTION TO REMAND

This putative class action concerns alleged labor law violations. Defendant JPMorgan Chase Bank, NA ("Defendant") removed the case to this Court from the California Superior Court. Plaintiff Benjamin Paparella ("Plaintiff") filed a Motion to Remand ("Motion"). After considering all papers and arguments submitted, the Motion is GRANTED.

PRELIMINARY MATTERS

After Plaintiff filed his reply papers, Defendant submitted a request for judicial notice. Under Federal Rule of Evidence 201, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201.

Defendant asks the Court to take judicial notice of *Johnson v. U.S. Vision, Inc.*, No. 10-CV-0690-BEN-CAB, 2010 WL 3154847 (S.D. Cal. Aug. 9, 2010). Defendant states that the decision was not available on Westlaw until after it submitted its papers. To the

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extent that judicial notice is needed, the Court takes judicial notice of the *Johnson* order, but not of the facts recited in the order. *See Lee v. City of Los Angeles*, 250 F. 3d 668, 690 (9th Cir. 2001) ("when a court takes judicial notice of another court's opinion, it may not do so for the trust of the facts recited therein, but for the existence of the opinion") (citation omitted).

BACKGROUND

Plaintiff filed his putative class action complaint ("Complaint") in Orange County Superior Court. In the Complaint, Plaintiff alleges that "there are less than 100 members in the proposed class" and that "[t]he amount in controversy including damages restitution, attorney fees, penalties, and value of injunctive relief sought does not exceed $5,000,000." (Compl. ¶ 4.)

Defendant removed to this Court, asserting jurisdiction under the Class Action Fairness Act ("CAFA").

LEGAL STANDARD

Removal to federal court is governed by 28 U.S.C. § 1441. Suits filed in state court may be removed to federal court if the federal court would have had original jurisdiction over the suit. 28 U.S.C. § 1441(a). Upon a plaintiff's motion to remand, a defendant bears the burden of establishing proper removal and federal jurisdiction. *Gaus v. Miles*, 980 F.2d 564, 566 (9th Cir. 1992). To protect the jurisdiction of state courts, removal jurisdiction should be strictly construed in favor of remand. *Harris v. Bankers Life and Cas. Co.*, 425 F.3d 689, 698 (9th Cir. 2005) (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941)). Whether an action is properly in federal court on the basis of removal jurisdiction "depends on whether the case originally could have been filed in federal court." *City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156, 163 (1997); 28 U.S.C. 1441(a).

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ANALYSIS

Defendants argue that removal was proper because this case could have been originally filed in federal court under the Class Action Fairness Act ("CAFA").

CAFA provides for removal of certain class action lawsuits. *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 681 (9th Cir.2006). Under 28 U.S.C. § 1332(d), which was added by CAFA, the district court is vested "with 'original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which' the parties satisfy, among other requirements, minimal diversity." *Abrego Abrego*, 443 F.3d at 680. "While § 1332 allows plaintiffs to invoke diversity jurisdiction, [28 U.S.C.] § 1441 gives defendants a corresponding opportunity." *Id.* Under Section 1441(a), defendants may remove to federal court "civil action[s] brought in a State court of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a).

"Under the plain terms of § 1441(a), in order properly to remove [an] action pursuant to that provision, [defendants] must demonstrate that original subject-matter jurisdiction lies in the federal courts." *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 33 (2002). While defendants removing lawsuits based on Section 1332(d) bear the burden of proving that the amount in controversy exceeds $5,000,000, the standard of proof that defendants must produce varies based on the allegations in the complaint. *Lowdermilk v. U.S. Bank Nat'l Ass'n*, 479 F.3d 994, 998 (9th Cir.2007). If "the plaintiff fails to plead a specific amount of damages, the defendant seeking removal must prove by a preponderance of the evidence that the amount in controversy requirement has been met." *Id.* at 998 (citation and quotation marks omitted). But if, as here, the plaintiff specifies an amount of damages in the complaint of $5,000,000 or less, and there is no evidence of bad faith, the defendant must prove to a "legal certainty" that the amount in controversy exceeds $5,000,000. *Id.* at 999 ("subject to a 'good faith' requirement in pleading, a plaintiff may

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sue for less than the amount she may be entitled to if she wishes to avoid federal jurisdiction and remain in state court . . . the defendant must not only contradict the plaintiff's own assessment of damages, but must overcome the presumption against federal jurisdiction"). Regardless of whether the preponderance of evidence or the legal certainty standard is used, the burden of establishing removal jurisdiction is on the defendant. *Abrego Abrego*, 443 F.3d at 685.

Here, Defendant fails to meet that burden. As noted, Plaintiff's Complaint specifically alleges that "there are less than 100 members in the proposed class" and that "[t]he amount in controversy including damages restitution, attorney fees, penalties, and value of injunctive relief sought does not exceed $5,000,000." (Compl. ¶ 4.) So, unless Plaintiff pled the damages in bad faith, the legal certainty test applies. *Lowdermilk*, 479 F.3d at 999.

The only evidence presented by Defendant is the single page Declaration of Tiffany A. Harris ("Harris Decl."). In her Declaration, Ms. Harris provides approximate numbers for work hours and pay of "employees holding a business banker *or similar title*." (Harris Decl. ¶¶ 3- 4 (emphasis added).) But the Complaint only addresses "business bankers." Defendants cannot meet the legal certainty test by expanding the class beyond the class definition contemplated in the Complaint. Further, the Declaration does not identify the weeks or hours actually worked by the employees. Instead, it states that "employees holding a business banker or similar title typically work 40 or more weeks per year," "typically work five or more days a week," and their work days are "typically longer than five hours." The Declaration contains no exhibits listing the number of employees or the hours worked during the class period. Nor does it break down the estimates based on "business bankers" or "similar titles." This evidence is not sufficient to meet the legal certainty standard. *See Lowdermilk*, 479 F.3d at 1001 ("absent more concrete evidence, it is nearly impossible to estimate with any certainty the actual amount in controversy").

Defendant also argues that the legal certainty test should not apply because Plaintiff acted in bad faith in alleging that there are less than 100 class members and that damages do not

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exceed $5,000,000 because there are "nearly four times as may putative class members during the class period." (Opp'n 13:4-5.) But again, the only evidence provided by Defendant is the Harris Declaration, which approximates the number of class members based on "employees holding a business banker *or similar title*." (Harris Decl. ¶¶ 3-4.) And the declaration only describes the "typical" and "approximate" numbers. (Harris Decl. ¶¶ 3-6.) "If Defendant, who is the only party which access to its employment records cannot more accurately approximate the class size, Plaintiff cannot be expected to plead [his] case with any more specificity than [he] did." *Lowdermilk*, 479 F.3d at 1002. Defendant cannot show bad faith with the sparse evidence presented here.

Plaintiff presented other arguments concerning Defendant's calculations, but because the Court finds that Defendant cannot meet the legal certainty test with the evidence presented, the Court need not address these other arguments. The Motion is GRANTED.

DISPOSITION

The Motion is GRANTED. This case is REMANDED to the California Superior Court.

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